

Assembly Bill No. 1938

CHAPTER 1118

An act to amend Section 391.7 of the Code of Civil Procedure, to amend Sections 210, 3041, and 8804 of the Family Code, and to amend Sections 1000 and 1601 of, and to add Chapter 3 (commencing with Section 1610) to Part 2 of Division 4 of, the Probate Code, relating to guardianship, conservatorship, and custody.

[Approved by Governor September 30, 2002. Filed
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LEGISLATIVE COUNSEL'S DIGEST

AB 1938, Aroner. Guardianship: conservatorships: custody.

(1) Existing law authorizes a defendant in any litigation pending in any court of this state, at any time until final judgment is entered, to move for a court order requiring the plaintiff to furnish security as a vexatious litigant, as defined. Existing law requires the litigation to be dismissed as to the defendant for whose benefit the security was ordered, if it is not furnished.

This bill would specifically extend these provisions to any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(2) Under existing law, before making an order granting custody to a person or persons other than a parent, without the consent of the parents, a court is required to make a finding that granting custody to a parent would be detrimental to the child and that granting custody to a nonparent is required to serve the best interest of the child.

This bill would, instead, require that the finding be made before making that order over the objection of, rather than without the consent of, a parent. The bill would define detriment to a child, and require a finding that parental custody is detrimental to the child to be supported by clear and convincing evidence unless the court finds by a preponderance of the evidence that custody would be granted to a person who has assumed the role of a parent for a substantial period, and would make related changes. This finding would constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child, absent a showing by a preponderance of evidence to the contrary, as specified. A finding of detriment to the child would not require any finding of unfitness of the parents for these purposes.

(3) Under existing law, upon the petition of the guardian, a parent, or the ward, a court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is in the ward's best interest to terminate the guardianship.

This bill would delete the determination that the guardianship is no longer necessary as grounds for an order terminating guardianship. The bill would make various legislative findings, and specify that certain petitions filed in a guardianship proceeding are grounds for the court to determine that the petitioner is a vexatious litigant.

The people of the State of California do enact as follows:

SECTION 1. Section 391.7 of the Code of Civil Procedure is amended to read:

391.7. (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.



(d) For purposes of this section, “litigation” includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The clerk of the court shall provide the Judicial Council a copy of any prefilng orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefilng orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.

SEC. 2. Section 210 of the Family Code is amended to read:

210. Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally, including the provisions of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice and procedure in, proceedings under this code.

SEC. 3. Section 3041 of the Family Code is amended to read:

3041. (a) Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

(b) Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence.

(c) As used in this section, “detriment to the child” includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.

(d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.

SEC. 4. Section 8804 of the Family Code is amended to read:

8804. (a) Whenever the petitioners move to withdraw the petition for the adoption or to dismiss the proceeding, the clerk of the court in



which the proceeding is pending shall immediately notify the department at Sacramento of the action. The department or the delegated county adoption agency shall file a full report with the court recommending a suitable plan for the child in every case where the petitioners move to withdraw the petition for the adoption or where the department or delegated county adoption agency recommends that the petition for adoption be denied and shall appear before the court for the purpose of representing the child.

(b) Notwithstanding the withdrawal or dismissal of the petition, the court may retain jurisdiction over the child for the purposes of making any order for the child's custody that the court deems to be in the child's best interest.

(c) If a birth parent who did not place a child for adoption as specified in Section 8801.3 has refused to give the required consent, or a birth parent revokes consent as specified in Section 8814.5, the court shall order the child restored to the care and custody of the birth parent or parents subject to the provisions of Section 3041.

SEC. 5. Section 1000 of the Probate Code is amended to read:

1000. Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

SEC. 6. Section 1601 of the Probate Code is amended to read:

1601. Upon petition of the guardian, a parent, or the ward, the court may make an order terminating the guardianship if the court determines that it is in the ward's best interest to terminate the guardianship. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

SEC. 7. Chapter 3 (commencing with Section 1610) is added to Part 2 of Division 4 of the Probate Code, to read:

CHAPTER 3. PERMANENT AND STABLE HOME

1610. (a) The Legislature finds and declares that it in the best interest of children to be raised in a permanent, safe, stable, and loving environment.

(b) Unwarranted petitions, applications, or motions other than discovery motions after the guardianship has been established create an



environment that can be harmful to children and are inconsistent with the goals of permanency, safety, and stability.

1611. If a person files a petition for visitation, termination of the guardianship, or instruction to the guardian that is unmeritorious, or intended to harass or annoy the guardian, and the person has previously filed pleadings in the guardianship proceedings that were unmeritorious, or intended to harass or annoy the guardian, this petition shall be grounds for the court to determine that the person is a vexatious litigant for the purposes of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure. For these purposes, the term “new litigation” shall include petitions for visitation, termination of the guardianship, or instruction to the guardian.

